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ABSTRACT

Current movements toward greater public access to the airways are discussed. Traditional practices have limited access to journalists employed by stations and to those who purchase time and have allowed only limited responses to station-initiated editorials. Legal arguments that support citizen demands for more access arise from the First Amendment, the public-interest section of the Communications Act of 1934, the Fairness Doctrine amended into the Act, and the Programming Policy Statement of the FCC. Recent court litigation on this issue and the experimental programs in certain areas in developing means for increased public access are also discussed. (RN)

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ACCESS TO THE AIRWAYS:

RATIONALE AND APPLICATIONS

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In About Television Martin Mayer calls public access to broadcasting a "great phony issue." He says:

> There is something bittersweet funny about the sight of all the ardent young lawyers and graduate students and junior executives at the foundations, none of whom can write a song anyone would sign or a book anyone would want to act--none of whom holds a position which gives his thought significance in the lives of others or could gather twenty-five people to hear him speak at a meeting--'demanding' access to an entertainment medium. Here is no point arguing with these people . . . but there is no reason to take them seriously, either.[1]

If Mayer means that amateur entertainers and would-be performers are not legally privileged to expose their lack of talents, few would disagree. However, when he speaks of "access" much more is at stake than entertainment. Further, Mayer seems to ignore both the laws governing broadcasting and the intentions of many seeking access to it.

Recently, the Democratic National Committee, the Congressional Black Caucus, and the Business Executives Move for Vietnam Peace,[2] have demanded access not to sing, dance, and to tell stories but to speak about such important issues as racism and Vietnam. In both Pittsburgh and San Francisco a program of limited guaranteed access for citizens was negotiated with the commercial TV broadcasters, and in other cities the broadcasters themselves have initiated programs of access.[3] Traditional broadcast practices have stimulated the current movement toward greater public input, since those traditional practices have previously included only three channels of access.

The first of these was provided by journalists employed by stations. While the First Amendment more or less guarantees to the press the right to seek out and report events and public issues, those people and issues regarded by the press as non-newsworthy or unrepresentative were excluded. The movement for broader access neither limits nor alters the freedom of broadcast journalists but it does seek to remedy journalists' perceptual incapacity.

The second way to gain access is to buy airtime. Because they appear within entertainment programming, ads gain attention. But to argue (as Mayer implicitly does) that Bayer aspirin is thus somehow more legitimately entitled to attention than are views on issues more momentous than a passing headache, is seriously to violate the marketplace of ideas concept central to democratic thought. If the worth of an idea is directly measurable by the costs bearable by the advertiser then only the rich may speak to the people and then only to sell goods.

The third channel of access is the response to station-initiated editorials, but this response is limited by the station's choice of issues. Sometimes issues selected by local station managements are simply uncontroversial, making response an exercise in vanity. Sometimes issues of greatest public concern are felt by station management--for whatever reasons--to be too controversial, too difficult, or too disturbing to discuss editorially.

As a result, access is usually limited to the established journalist, to the rich, the colorful, and the vain. Yet it is the democratic ideal that ideas flow freely so that the truth will out, and that public problems will be recognized and treated intelligently before they become insurmountable. Under traditional forms of access the marketplace of ideas remains largely unrealized. Limited public access will not recreate the town meeting, but it can bring us closer to the ideal.

Beyond its intrinsic desirability, legal arguments support citizen demands for access. These arguments arose from four legal instruments: 1) The First Amendment; 2) the public interest standard of the Communications Act of 1934 as amended; 3) the Fairness Doctrine (both as a regulatory policy statement issued by the Federal Communications Commission and as a statutory requirement amended into the Communications Act); and 4) the Programming Policy Statement of the FCC which calls for "Local Self-Expression" within the broadcaster's service area.

Jerome Barron, in "Access to the Press--A New First Amendment Right," sounded the clarion call for an expanded interpretation of that Constitutional guarantee. Barron notes that censorship, as prior restraint, is traditionally opposed on the assumption that a "free marketplace" of ideas is desirable in a free society. However, the courts have never provided guarantees of a flux of opinions in that marketplace. Thus exclusive access to the media of public communication restricts that

that marketplace.[4] Further, Barron argues, "the test of a community's opportunities for free expression rests not so much in an abundance of alternate media but rather in an abundance of opportunities to secure expression in media with the largest impact."[5] That means broadcasting.

Barron further argues that traditional interpretations of the First Amendment essentially protect the rights of the press, and that providing access to others does not trample the free speech rights of journalists. Free expression, Barron concludes, is most meaningful in terms of number of potential listeners and viewers. He proposes a new interpretation, and recent cases seem to indicate a trend towards that new interpretation.

The case of the Business Executives Move for Vietnam Peace (BEM) vs. FCC is instructive. BEM had attempted to speak out against the war by means of paid advertising, but were refused the sale of time to air its messages on WTOP-TV, Washington, D. C. The station's refusal was supported by the FCC. BEM argued before the U. S. Court of Appeals in Washington, D. C. against the prohibition of paid advertising on public issues. In his decision supporting BEM against the FCC, the Post-Newsweek stations, and the Columbia and American Broadcasting networks, Circuit Judge J. Skelly Wright held that "a flat ban on paid public issue announcements is in violation of the First

Amendment, at least when . . . other sorts of paid announcements are accepted."[6] The decision did not require any station to carry anti-war spots, but it established that controversial messages are not out of bounds as paid advertising. For those with an interest in representative access it means that an extreme exclusionary policy determining who and what kinds of messages should be aired will not satisfy our law guaranteeing free speech. It is a small link in the chain, but an important one.

More germane to the argument for representative access, Wright argued that since government and broadcasting are inextricably linked, the restriction of speech by the broadcaster is in effect a state action and, as such, constitutes restriction of free speech by the government.[7] He noted: "There is ample authority for the principle that specific governmental approval of, or acquiescence in challenged action by a private organization indicates "state action," and that unlike most of the private entities held to be subject to First Amendment constraints, the broadcast media are specifically dedicated to communication."[8] This does not mean that all who are excluded are denied free-speech rights. It does mean that "the public's First Amendment interest constrains broadcasters to provide a full spectrum of viewpoints, but also to present them in an uninhibited, wide-open fashion and to provide an opportunity for individual self-expression."[9] Furthermore, this constraint is not

in conflict with the broadcast journalist's rights to free speech in news and public affairs coverage. In a sense the BEM decision is an echo of Hugo Black's 1945 statement in the U.S. vs. Associated Press case: "Freedom of the press from governmental interference under the First Amendment does not sanction suppression of that freedom by private interest."[10]

Under the Communications Act of 1934, a prime criterion for the licensing of a station is that the station serve the "public interest." As a mechanism for assuring that licensees behave in a manner reflecting this mandate, the law requires each station to seek renewal of its license every three years, and to account for its stewardship. The right of a citizen's group to enter into the hearings of station re-licensing was established when the Court of Appeals reversed the FCC and allowed individuals and organizations claiming to represent the Black Community in Jackson, Mississippi to petition against the relicensing of WLBT-TV.[11] Although an extra-legal agreement was negotiated, the court's decision to allow a citizen's group standing in hearings established a significant precedent. The relevance of the WBLT-TV case to arguments for public access is that "public interest" may be determined by the public. If portions of the public served by a station determines that greater citizen access is necessary to the "public interest" it may seek greater access, either relying upon the good will of broadcasters or upon the legal device --

a Petition To Deny the station license -- to argue that greater citizen access is required for adequate "public interest."

Perhaps the single most obvious argument for access is the Fairness Doctrine. If portions of the broadcast community feel a station is not serving their interests by denying them, or their views, access to the airwaves on issues of public controversy, the affected groups may file Petitions to Deny the station license. Since the Doctrine establishes an affirmative obligation by licensees to "encourage and implement the broadcast of all sides of controversial public issues over their facilities,"[12] the burden of insuring fairness in the presentation of public issues falls squarely on the stations.

One final legal formulation provides a further rationale for public access. The 1960 "Programming Policy Statement" was an important step in requiring the licensee to submit evidence of the measures he has taken and the effort he has made to determine the tastes, needs and desires of his community or service areas and the manner in which he proposes to meet those needs and desires.[13]

The Committee for Open Media (COM) in San Francisco petitioned against KPIX-TV on First Amendment, Fairness, and Programming Policy Grounds. COM showed that over 100 recognizable organizations in the KPIX-TV broadcast area were never represented on the station's facilities, ranging from the Black Panther Party to the Bay area

John Birch Society.[14] Further, COM claimed that the station kept no record of requests for air-time over its three year licensing period and had thus neglected an important measure of community needs, and that it had not satisfied its Fairness Doctrine obligations. Thus, the First Amendment, the Public Interest standard of the Communications Act, the Fairness Doctrine, and the FCC Programming Policy Statement provide legal arguments for some degree of guaranteed public access. How effective the legal arguments elaborated above will prove in pending cases remains to be seen. At this writing the BEM and Democratic National Committee (DNC) cases have been argued before the Supreme Court and await judgment. Broadcasting magazine of October 23, 1972 speculates that the Court will reverse both the BEM and DNC decisions and rule that since the government itself did not clearly mandate against public access, there exists no First Amendment violation.

Regardless of the Supreme Court's decision, however, arguments advanced thus far by advocates of broader access have succeeded both in and out of the courts. Several cities have initiated various forms of access, sometimes at the prodding of citizens groups. On their own initiative several Westinghouse Stations have begun access programs. KYW-TV, Philadelphia, in the summer of 1972, ran a 90 minute program entitled "Speak Out," aired at 11:30 Saturday nights. Participants expressed themselves in the studio for as much as two minutes a subject.

WJZ-TV used a weekly half-hour in evening prime time for "Baltimore Speak-Out," with participants choosing between live airing or tape for minute long messages or live phone calls of 30 seconds maximum and letters read by station staff. WBZ-TV aired special inserts on newscasts, two public affairs shows and early and late evening specials.[16] WPOP-TV, Hartford, Connecticut and WHAS-TV, Louisville, Kentucky also initiated, without citizen prodding, access experiments on a spot basis, after consulting with Professor Phillip Jacklin of the San Francisco Committee for Open Media (COM). In San Francisco, Jacklin had previously arranged a one-minute spot format and this plan was accepted by WHAS-TV and WPOP-TV.[17]

Television broadcasters have been persuaded by COM in Pittsburgh and San Francisco to accept formal agreements guaranteeing a regular number of spots per week and regular repetitions of these citizen-initiated editorials. The number of spots allocated by the stations in the two cities ranges between 12 and 18 per week and repetition of messages ranges from 3 to 9 per week.

Interestingly, in both Pittsburgh and San Francisco, COM negotiators were faculty and students from Colleges and Universities in those cities. Students and faculty from Berkley, San Jose State, Santa Clara, and Stanford formed COM in San Francisco in 1971. In 1972, students in Media classes joined the writers of this article, who

teach Communications at the University of Pittsburgh, and negotiated written agreements with three Pittsburgh VHF stations. The terms of these agreements are illustrative of a workable plan for representative access which is both legal and useful to the stations involved.

The impression given by Martin Mayer and others writing about public access is that of local lunatics preempting favorite programs to harangue viewers on issues of little interest to the community. This viewers' nightmare was not experienced in Pittsburgh or in San Francisco. Rather, in widely scattered editorial minutes throughout the week, one can see members of his community in pre-recorded video-taped fifty-second spots. These messages, recorded at the local stations, are initiated by viewers and give the outward appearance of editorials scheduled in a manner similar to commericals, i.e., they occur during commercial breaks and in adjacencies. These messages, accompanied by ten-second disclaimers, have included a wide scope of topics from national issues, such as the lettuce boycott and abortion, to local issues such as city taxes.

COM, Pittsburgh, and about seventy-five participating citizen's groups, such as the Pittsburgh Physicians for Social Responsibility and the Black drug rehabilitation group -- Ile Elegba, obtained written agreements in July 1972 from WTAE-TV, WIIC-TV, and KDKA-TV for a ninety-day experiment in public access. Basic features of the agreements are as follows:

1. Stations ask, on the air, for citizens' editorials and for ideas for editorials.

2. The stations judge which of the editorials will be aired, but do not reject them on grounds of controversiality.

3. Stations invite writers of editorials to their studios to videotape them.

4. Editorials are then scheduled during various segments of the broadcast day (e.g. early morning, day time, late afternoon, 6:00 - 11:00 P.M., and late night) on a rotating basis for one week.

5. Stations reserve the right to refuse any proposed message which violates the law, speaks for a political candidate or a ballot issue.

Thus far, in Pittsburgh, over four hundred one-minute editorials initiated by citizens, either individually or as representatives of groups have been aired. Generally, responses of station management indicate that these programs of access will continue. As judged by increasing numbers of requests for air time from citizens to speak out, interest in access seems to be growing. People, generally, seem to be interested in speaking about issues of concern to their fellow viewers. To date, despite Mr. Mayer's fears, no one has asked to tap dance.

FOOTNOTES

[1]Martin Mayer, About Television, (N.Y.: Harper & Row, 1972), p. 354.

[2] , "Congressional Access: Push Becomes Shove," Broadcasting, June 19, 1972, p. 17.

[3]See , "Westinghouse Unit Plans 'Free Speech' on three TV Stations," Wall Street Journal, June 14, 1972, p. 26: , "1972's 'Vox Pop' is Access Through Spots," Broadcasting, July 10, 1972, p. 30.

[4]Jerrome Barron, "Access to the Press--A New First Amendment Right," Jerrome Barron and Donald Gillmor, eds., Mass Communication Law: Cases and Comment, (St. Paul, Minnesota: West Publishing Co., 1969), p. 125.

[5]Ibid.

[6]U.S. Federal Reporter, "Business Executives Move for Vietnam Peace vs. Federal Communications Commission and the United States of America," 450 F. 2d 642, p. 646.

[7]Ibid., p. 653.

[8]Ibid., p. 654.

[9]Ibid., p. 655.

[10]Miron Mintz and Jerry S. Cohen, America, Inc.: Who owns and Operates the United States? (New York: The Dial Press, 1968), p. 101.

[11]Nicholas Johnson, How to Talk Back to your TV Set, (New York: Bantam Books, 1970), p. 192.

[12]FCC Editorializing Report, in Herman Kahn, ed., Documents In American Broadcasting, (New York: Appleton-Century-Crafts, 1968), p. 377.

FOOTNOTES (continued)

[13]Report and Statement of Policy re: Commission EN BANC Program Inquiry, in Kahn, op. cit., p. 221.

[14]COM Petition to Deny KPIX-TV, F.C.C. file number BRCT-7, 1972, Exhibit 4, pp. 2, 3.

[15]Ibid., p. 9

16 , "Westinghouse Unit Plans 'Free Speech' on three TV Stations," Wall Street Journal, June 14, 1972, p. 26.

17 , "1972's 'Vox Pop' is Access Through Spots," Broadcasting. July 10, 1972, p. 30.

[18]Letters of Agreement to Committee for Open Media KDKA-TV, dated July 3, 1972, pp. 1, 2, signed by James King, General Manager; from WIIC-TV, dated June 16, 1972, pp. 1-3, signed by Leonard Swanson, General Manager; and from WTAE-TV, dated June 27, 1972, pp. 1, 2, signed by John Conomikes, General Manager.

[19]op. cit. Broadcasting, July 10, 1972, p. 30.